Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

November 29, 1994

Ms. Tracy R. Briggs
Assistant City Attorney
City of Houston
P.O. Box 1562
Houston, Texas 77251-1562

OR94-773

Dear Ms. Briggs:

You have asked if certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. That request was assigned ID# 28531.

The City of Houston (the "city") received a request for information from a city employee about the city's drug testing program and his own test. Most of the information the requestor asked for was provided by the city.[1] However, the city asserts that a report related to the requestor's drug test is excepted from disclosure under section 552.103(a) of the Government Code.[2] To show the applicability of the section 552.103(a) exception, a governmental entity must show that (1) litigation is pending or reasonably anticipated and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex.App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4.

---

[1]According to correspondence between the city and the requestor, the city did not have certain documents the requestor sought. The city also explained to the requestor that the Open Records Act does not require the city to compile new information in response to a request. Open Records Decision Nos. 561 (1990); 362 (1983) at 2. The requestor subsequently sent the city another letter explaining what type of information he is seeking. We assume that the city either does not have information responsive to the requestor's second letter or has already released the requested information other than the report at issue in this decision.

[2]We note that this does not appear to be a medical report subject to the access provisions of the Medical Practice Practice Act, article 4495b, V.T.C.S.

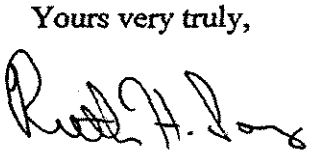
The city contends that the employee may initiate legal action against the city based on disciplinary action taken due to his positive test result. The attorney representing the city in connection with the employee's suspension hearing states that it is her belief litigation is reasonably anticipated because (1) the request letter asked for the work addresses of city employees "where legal documents can be served/delivered" (2) the requestor complained of city policy violations and (3) the requestor's attorney wrote a letter to the requestor's supervisor concerning his client's test results.

We have reviewed the requestor's letter and the attorney's letter, which were submitted to this office. The requestor asked to have his test results invalidated, complained of the manner in which his case had been handled, and asked for a variety of information in addition to the addresses. The requestor added that he had been told by the city's legal staff to make his request in writing. The attorney discussed how over-the counter medication and certain foods can bring about positive test results and suggested that the city re-test his client on a regular basis to "verify" that the requestor does not use drugs. We note that neither of these letters contained any type of threat to sue the city or to pursue legal action.

This office has determined that litigation was reasonably anticipated when a former employee filed discrimination complaints against the governmental entity, then hired an attorney who threatened to sue. Open Records Decision No. 555 (1990). Litigation was also found to be reasonably anticipated where an attorney demanded that the governmental entity pay damages to his client or otherwise he would bring a lawsuit. Open Records Decision No. 551 (1990). However, in Open Records Decision No. 361 (1983) we determined that litigation was not reasonably anticipated where an applicant who had been rejected for a job hired an attorney and that attorney began investigating the reasons for the rejection. We pointed out that there were no statements of intent to bring suit against the governmental entity. *Id.* at 2.

Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 (1986) at 4. For litigation to be reasonably anticipated there must be "concrete evidence" showing that litigation may ensue. *Id.* The city has not established that litigation is reasonably anticipated in this situation. Since the city has not shown the applicability of section 552.103(a), the report must be released to the requestor. We are resolving this matter with an informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact our office.

Yours very truly,



Ruth H. Soucy
Assistant Attorney General
Open Government Section

RHS/MAR/rho

Ref.: ID# 28531

Enclosures: Submitted documents

cc: Mr. Jimmy Franklin Kaylor
4045 Linkwood Drive #206
Houston, Texas 77025
(w/o enclosures)